

SOUTH AFRICA / JUDGMENT

Van Wyk v S (CA & R 85/2015)

[2021] ZANCHC 8 (8 January 2021)

[2021] ZANCHC 8

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Mofokeng

CASE / FILE NUMBER

CA & R 85/2015

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTHERN
CAPE DIVISION, KIMBERLEY
Case
No: CA &
R 85/2015
Heard

on:

30/11/2020
Delivered
on: 08/01/2021
In

the matter between: GERT
 VAN
 WYK Appellant
 and
 THE
 STATE Respondent

Quorum: Mamosebo J et Mofokeng AJ

JUDGMENT

ON APPEAL

MAMOSEBO J

[1] The appellant was convicted by Regional Magistrate, Mr A Huysamen, in Fraserburg, Northern Cape, on two charges of rape of a 14-year old girl in contravention of s 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1]; which rape would have occurred between June 2012 and July 2012. The State further alleged and proved that since she was 14 years old the provisions of s 51 and/or 52 of the Criminal Law Amendment Act[2] were applicable. The appellant had pleaded not guilty but was nevertheless convicted as charged and sentenced to life imprisonment.

He now appeals against his conviction and sentence.

[2] The issues that stands for determination on appeal are the following:

In respect of the conviction:

2.1 Was the procedure followed by the Magistrate in admonishing the complainant to tell the truth correct and in accordance with the law?

2.2 Did the State succeed in proving its case against the appellant beyond reasonable doubt?

In respect of sentence:

2.3 Whether there are substantial and compelling circumstances justifying a deviation from the imposition of the prescribed minimum sentence of life imprisonment.

[3] A brief historical background is that the complainant was born on [...] and on the date of her testimony was fifteen years and six months old. Her evidence was obtained through an intermediary in terms of s 170A of the Criminal Procedure Act[3], (CPA).

[4] The complainant's version is that during 2012 she resided with her uncle, W D[...] and aunt, E D[...], her two younger brothers, J[...] and A[...] aged 11 and 8 years, and a nephew, B D[...], 6 years and a niece, J D[...], 12 years and uncle Gert van WYK, who is her mother's and aunt E D[...]'

brother.

- [5] They stayed in a four-roomed house comprising, 2 bedrooms, a kitchen and a toilet. The one bedroom was occupied by her uncle aunt and nephew, while the other bedroom accommodated the rest of them. She

shared a bed with her niece while uncle Gert (the appellant) and her two brothers shared the other bed depicted on Exh B. She and her niece slept on the bed marked A.

- [6] on the night of the incident, a date which she cannot remember, but which occurrence is predicated on his release from prison, she heard the appellant entering their bedroom. She recognised his voice when he spoke to her. She then felt her and J[...]’s (12 yrs) blanket being removed and her pyjamas with her panty being pulled out. She tried to scream but he blocked her mouth and raped her. He threatened to kill her should she report the incident to anyone. She remained on her bed crying as her private parts were painful. He went to his bed and slept. The other children were all present in the bedroom but asleep.
- [7] The appellant approached her again on a Friday night, she cannot remember the date, and forced himself on her again. The same process and threats followed before he returned to his side of the bed and slept. She cried and slept.
- [8] The complainant obviously did not immediately report the sexual attacks on her to the family. However, she happened to develop a rash on her neck and was taken to hospital. She summoned courage and reported to the nurse attending her, Sister Doreen Sonja Douts, that she was raped. Sister Douts referred her to a doctor who was only available on a Tuesday. The complainant was accompanied by her aunt, Ms E D[...], when she was examined by the doctor. The doctor advised

Ms Demas and her ward to report the incidents to the police which they did.

- [9] The complainant was cross-examined at length on the discrepancies as regards the dates in her statement and her testimony in court. She ascribed the faded memory to the time lapse.
- [10] Ms Maria Magdalena Smit is the probation officer who compiled the report and recommended that the complainant testify through an intermediary. Having compiled a written report, she conducted a further interview with the complainant on 05 June 2012. The report recorded that she cried during the interview, was withdrawn since the incident which has traumatised her. The probation officer also dealt with the impact the incident has had on the complainant, including her disturbed sleeping and eating patterns. Her behaviour at school has also been adversely affected, as she has grown quieter than usual. Her evaluation of the complainant is of a girl who has become traumatised, shocked, shy, introverted, temperamental and easily frightened. She was assessed as a victim displaying the signs of rape. Her self-esteem and self- confidence have taken a knock. She immediately withdraws to the bedroom, which is also one of the classic symptoms of a child who has been raped. She intimated to the probation officer that she is scared of the appellant and men in general after the incident.

- [11] Ms Doreen Sonja Douts, the Nursing Sister at Fraserburg Hospital, testified of her 27 years nursing experience. She has acquired a forensic qualification to conduct examinations pertaining to sexual assaults, completion of J88 forms and assaults in general. On 13 September 2012 she was invited by a colleague, Sister Florence Ntoate, into the consulting rooms to assist with “a dull looking lady” only to find that it was the complainant. She deduced that the complainant was emotionally traumatised from the manner she was seated (the foetal position). She explained the position as follows ‘when a person sits with his or her knees bent upwards, hands on the thighs and head bowed down.’ She said that was a sign of a person who was injured and in pain and just needed to keep her comfort zone to herself. She invited the complainant to tell her what happened. The complainant was reluctant to speak until Sister Douts assured her that she could trust her. That is when the complainant disclosed to her that she was sexually molested by her uncle a month earlier and explained how it happened.
- [12] Sister Douts conducted a vaginal examination. Although there was no tearing the hymen was absent. She had a vaginal discharge with a bad odour. She observed that her labia minora was not prominent which meant that she was not sexually active but that she had had sexual intercourse with a person who had an infection. She did not complete the J88 form but referred the complainant to the doctor.
- [13] Ms E D[...] is the complainant’s aunt and foster mother for over four years. The complainant is her sister’s child. The appellant is her brother. The appellant resided at her home from June to September 2012 upon his release from prison. She took the complainant to the clinic because of a rash but during consultation with Sister Douts the complainant was reluctant to respond to the Sister’s questions in her aunt’s presence who then excused herself from the consultation room. When Ms Demas was later advised to bring the complainant for consultation with the doctor the following Tuesday, she did so. The doctor informed her that the complainant was raped and advised her to lay charges. She accompanied the complainant to the police station. When she enquired from the complainant why she did not report to her the response was that the appellant, threatened to kill her should she do so. It was put to her that the appellant only stayed at her home from 25 July to 25 September 2012 but she was adamant that he stayed at her home from June to September of that year. The State closed its case.
- [14] The appellant’s version is that he pleaded not guilty to the charge of rape because the date on which the State alleges he committed the offence he had been incarcerated at the Victoria-Wes Prison from 24 April to 09 July 2012. He then resided with his sister, Ms E D [...], the last state witness, from 09 to 25 July 2012 upon his release. From 25 July 2012 to 25 September 2012 he stayed with Dampie Freslaar when the police arrested him for the rape of the complainant. He denied ever raping the complainant. The appellant therefore raised an alibi.

- [15] In as far as the act of rape is concerned the complainant is a single witness. The remarks by Holmes JA in *S v Artman and Another*[4] are apposite:

“She was, however, a single witness in the implication of the appellant. The fact, however, does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects; see R v Mokoena, 1956 (3) SA 81 (AD) at pp 85-6. The trial Court unanimously found that her evidence passed this test. I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense.”

- [16] In *S v Jackson*[5] and *S v M*[6] the obligatory requirement of corroboration in as far as sexual offences cases are concerned the Supreme of Appeal declared that it was based on an irrational and outdated perception. The complainant’s rape was not reported immediately but the delayed report is covered by s 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[7] and no adverse inference will be drawn from the length of the delay, besides it was adequately explained.

ON CONVICTION

- [17] The first issue, raised by Mr van Tonder for the appellant, is whether the procedure followed by the presiding officer in the admonishment of the complainant before she testified was correct and in accordance with the law. He held a negative view whereas State counsel, Mr Cloete, argued in its favour.

- [18] The complainant was 14 years at the time of the incident but 15 years and 6 months when she testified. The Magistrate asked her, inter alia, the following questions (the repetition of the court's questions by the intermediary to the complainant have been omitted):

“Magistrate: Hoe oud is u nou, Elisa? Complainant: 14 jaar oud.

Magistrate: Voordat u voortgaan, Elisa, die hof moet nou vir u vra of u die waarheid sal praat, die hof moet nou vir u insweer.

Complainant: Ja, juffrou.

Magistrate: As jou ma nou stuur na die kafee met geld om brood te koop en jy koop lekkers daarmee, is dit reg of is dit verkeerd?

Complainant: Verkeerd

Magistrate: Wat gebeur dan daarna as jy so verkeerd opgetree het?

Complainant: Dan kry ek slae.

Magistrate: Nou die hof gaan nie vandag vir u vra om te sweer dat u die waarheid gaan praat nie. Maar die hof waarsku u net om die waarheid te praat en indien u nie die waarheid gaan praat nie, dan gaan u in groot moeilikheid kom.

Complainant: Ja.

Magistrate: Goed dankie, die hof is tevrede dat sy onderneem het om die waarheid te praat in terme van artikel 164 van die Strafproses kan u dan nou maar voortgaan dat sy behoorlik ingesweer is.”

[19] Mr Van Tonder, relying on *S v Matshiva*[8] submitted that the Magistrate had failed to comply with the peremptory enquiry set out in s 162 read with 164 of the CPA as the admonition and the questioning were inadequate which renders the complainant’s evidence inadmissible and allow the appeal.

[20] Mr Cloete on the other hand invoked *S v SB* [9], *Haarhoff and Another v Director of Public Prosecutions, Eastern Cape*[10] and *S v SD*[11] asserting that there is no rigid or formal process to be followed in questioning child complainants as a flexible process is envisaged;

the central purpose of the process to be followed gravitates towards whether the evidence led will be reliable or not; that the

complainant was duly admonished and found to be competent to testify, argued counsel. The complainant may have been 15 years and 6 months when she testified. The fact that the probation officer had assessed her in advance and determined that she should testify through an intermediary despite her age, should not be used to discredit the approach followed by the Magistrate in questioning her to determine whether she understood what was meant to tell the truth. The Magistrate was steeped in the atmosphere of the courtroom and also observed the complainant.

[21] In *Haarhoff* [12] at para [27] the Court said:

“[27] I mention en passant that the fact, that the trial court did not make a specific finding that the complainant did not understand the nature and import of the oath or affirmation before deciding to admonish her, was not raised as an issue in this appeal. In any event, it is settled law that an express finding is not a prerequisite to admonishing a witness.” See S v B 2003

(1) SACR 52 (SCA) para 15.

[22] The following are instructive remarks by the Constitutional Court in *The Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*[13]:

“[165] The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. [S]ome of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what

it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.””

[23] The Constitutional Court continued at para 166 that:

“[167] Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of the intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.” (emphasis added).

[24] The Matshiva case is distinguishable from the case before us in that the witness was never placed under oath or admonished to tell the truth as was done in *casu*. No case has been made out on behalf of the appellant that the complainant’s evidence is inadmissible on that basis. I am satisfied that the requirements of s 162 have been met and no substantive injustice has occurred.

[25] The second issue to be determined is whether or not the evidence of the complainant was reliable enough to sustain a conviction on the charge of rape. Mr Van Tonder submitted that it was not in that she got muddled with dates as stated earlier and was a single witness in a rape incident. It was further contended that it was improbable that she cried and yet, no one in the house heard her cries. Mr Van Tonder submitted further that the evidence of Sister Douts was not strong enough to support the conviction of the appellant and maintains on behalf of the appellant that the evidence by the State is of a poor quality and cannot sustain a conviction.

[26] Mr Cloete argued that no valid criticism was levelled against the complainant on behalf of the appellant. How she cried was not taken up during the trial. It is not the appellate court’s duty to speculate but she may have sobbed after the ordeal and that is not unimaginable for a fourteen year old. In any event, a concession was made by Mr Van Tonder that it is not improbable that nobody could have heard her crying. Counsel lost sight of the fact that she was

warned by her attacker, who was in the house not to raise the alarm or risk being killed.

[27] What is material and consistent from the evidence which overshadows the issue of the date is that, first, she knows the identity of the rapist who stayed in the same house and shared a bed allocated to him and her two younger brothers. The appellant himself in his version repeatedly confirmed that the complainant knows him since her childhood and even recognises his voice. She was further able to recognise his voice when he uttered the death threats to her. There could therefore be no mistake in as far as the appellant’s identity is

concerned.

- [28] Secondly, the incident also revolves around the appellant's release from prison which happened in that first week. Ms Demas, his sister, confirmed that he stayed with them upon his release from prison and supplied relevant dates. There is further compelling medical evidence that corroborates the complainant's version that she was raped. Mr Van Tonder criticised the evidence of Sister Douts maintaining that it was insufficient to support the complainant's case and secure the appellant's conviction. I disagree. Sister Douts is an experienced nurse trained in the forensic field. She not only made an observation about the sitting position of the complainant but had also conducted a clinical examination that confirmed that she was raped. A finding that was later confirmed by the medical doctor.
- [29] The complainant's evidence is further attacked on the basis of the contradiction regarding the specified date in her statement made to the police and her oral evidence in court. Molemela JA has reiterated what was said in *S v Mafaladiso en Andere*[14] in *Haarhoff*[15] and it befits to quote the para in full:

"[42] In S v Mafaladiso en Andere this court emphasised that the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. It behoves the courts to keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Contradictory versions must be considered and evaluated on a holistic basis. Furthermore, the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions, the quality of the explanations and the connection between the contradictions and the rest of the witness's evidence are among other factors to be taken into consideration and weighed up."

- [30] The complainant's evidence cannot be assessed in isolation but must be weighed against the totality of the evidence. Evidently, medical evidence shows that she was raped and the evidence of the probation officer confirmed her behaviour and trauma as indicative of the consequences of a raped victim. Even if one were to accept that she may have erred in as far as the date is concerned but she was able to remember that the incident happened immediately after the appellant's release from prison. Not remembering the date does not make her dishonest or more importantly an unreliable witness or even provide any justification to disqualify or discredit her entire testimony. I am satisfied that save for the issue with the date, for which a persuasive explanation was considered and accepted, her entire evidence was reliably recounted.
- [31] The appellant raised a bare denial as his defence. The Magistrate found that he evaded questions and in certain instances even refused to answer the questions posed to him or repeatedly stated "ek kan nie daarmee stem nie." The Magistrate has also considered the reason why the appellant moved out of his sister's home and dealt with it comprehensively

in the judgment. The defence witness did not take the appellant's case any further. The trial court has correctly found that the State had succeeded in disproving the appellant's alibi and in finding that the bare denial by the appellant in the commission of the rape was false. I am satisfied that the State had succeeded in proving its case beyond reasonable doubt. It follows that the appellant's conviction on the charge of rape should stand.

ON SENTENCE

- [32] The last aspect pertains to whether there were substantial and compelling circumstances present justifying a deviation from the prescribed minimum sentence of life imprisonment. The relief sought by the appellant is for this court to set aside the sentence imposed and to replace it with an attenuated one.
- [33] It is trite that sentencing is within the discretion of the trial court. An appeal court will only interfere with the sentence if there was a misdirection or if the sentence imposed is shockingly inappropriate. See *S v Sadler*[16] *S v Pillay*[17]
- [34] It was contended on behalf of the appellant relying on *S v Abrahams*[18] that the complainant's rape was not one of the worst rapes imaginable and this factor should contribute towards substantial and compelling circumstances. In countering this submission Mr Cloete put emphasis on the tender age of the complainant and the testimony of Sister Douts and Ms Maria Magdalena Smit, the social worker who testified in relation to the traumatic effect this rape has had on the complainant. The appellant carries a previous conviction of rape having been convicted on 27 August 1998 and sentenced to 8 years imprisonment, of which, 2 years were suspended for 5 years on normal conditions.
- [35] The society, particularly women and children, needs to be protected from the appellant. The case of *Abrahams* was decided in 2002 and the boni mores of society in respect of rape has evolved. Rape continues to be a scourge which must be dealt with decisively. The remarks by Ponnann JA in *S v Matyityi*[19] are pertinent when the Court said[20] that sentencing should be victim- centred.
- [36] The following factors are worth mentioning in aggravation of sentence: The rape of the complainant occurred not only in her own home (her supposed fortress) but also on her own bed (her supposed elementary comfort zone) by her own uncle (her supposed protector) who on the contrary threatened to kill her should she alert any to his vile deed.
- [37] Rape is one of the worst forms of abuse an innocent child can be put through. I am not persuaded by the submission that this was not the worst form of rape hence the sentence should be attenuated. The fact remains that a permanent emotional scar has been inflicted on the life a girl who was in her bloom.

[38] I am satisfied that the trial court has taken all the above factors into consideration and did not err in its finding that there were no substantial and compelling circumstances. The submission that such circumstances exist is without merit. The sentence of life imprisonment stands to be confirmed.

[39] In the result, the following order is made:

The appeal against conviction and sentence is dismissed.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I agree

A MOFOKENG

ACTING JUDGE OF THE HIGH COURT

For the appellant: Mr A van Tonder

Instructed by:

Legal Aid South Africa

For the respondent: Adv JJ Cloete

Instructed by:

The Director Public Prosecutions

[1] 32 of 2007

[2] 105 of 1997

[3] 51 of 1977

[4] 1968 (3) SA 339 (A) at 341A- C

[5] 1998 (1) SACR 470 (SCA) at 476e

[6] 2006 (1) SACR 135 (SCA) at 199j - 200c

[7] 32 of 2007

[8] 2014 (1) SACR 29 (SCA)

[9] 2014 (1) SACR 66 (SCA)

[10] 2019 (1) SACR 371 (SCA)

[11] 2020 (1) SACR 78 (KZP)

[12] Fn 10 above

[13] 2009 (2) SACR 130 (CC) at para 165

[14] 2003 (1) SACR 583 (SCA)

[15] At para 42

[16] 2000 (1) SACR 331 (SCA) at para 10

[17] 1977 (4) SA 531 (A) at 535

[18] 2002 (1) SACR 116 (SCA)

[19] 2011 (1) SACR 40 (SCA)

[20] At para 16

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